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DISQUALIFICATION OF JUDGE BY INTEREST—AFFINITY. *State* v. *Wall*, 26 So. R. Fla. 1020, (1900). The Supreme Court of Florida has just decided that a man is related by affinity to the husband of his wife's niece. There is a statute in force in that state providing that no person shall sit as judge in any case where he is related to either of the parties whether by consanguinity or affinity. In the present case, the judge, being the husband of the complainant's wife's aunt, had refused to preside at the trial. This was an action to compel him to do so. The Supreme Court sustained him in his refusal.

In Anderson's Dictionary of Law, "affinity" is defined as "the connection which arises from marriage between the husband and the *blood-relatives* of the wife, and between the wife and the *blood-relatives* of the husband." It would appear that there was no affinity between the judge and the complainant. There is no blood-relationship between his wife and the niece's husband—there is no com-

mon ancestor from whom they can trace their descent. The Florida Court gets around this difficulty by taking it that husband and wife are one, in law, and since she is related by affinity to the niece's husband, he is also. See *Kelly* v. *Neely*, 12 Ark. 657, (1852).

There is a dictum of Chancellor Walworth in the case of *Paddock* v. *Wells*, 2 Barb. (Chancery) 331, (1847), in which he states that relationship by affinity may also exist between the husband and one who is connected by marriage with a blood-relative of the wife. He gives as an example the marriage of two strangers to sisters, and states that they are related in the second degree of affinity just as the sisters are in the second degree of consanguinity.

His statements, however, were entirely unnecessary, as the party in question was the first cousin of a former husband of the defendant, issue of which marriage were still surviving.

There was likewise clearly affinity in the other New York case of *R. R.* v. *Schuyler*, 28 How. Pr. 187, (1855).

It may be safely said that the question is an open one in the majority of the states. It is well settled that a man's brother is not related by affinity to those to whom he is so related: *Rank* v. *Shewey*, 4 Watts 218, (1835); *Chase* v. *Jennings*, 38 Me. 44, (1854); *Bigelow* v. *Sprague*, 140 Mass. 425, (1886). In these states the question in the present case has not been raised.

Some authorities consider that these cases show a tendency to oppose the Florida doctrine if the case should arise. But there seems to be nothing to lead to this conclusion. If these cases had been tried in Florida, the same decision would have been rendered.

There are, however, many cases which flatly contradict the present decision. *Hume* v. *Bank*, 10 Lea (Tenn.) 1, (1882), following *Moses* v. *State*, 11 Humph. 232, (1850), holds that it is impossible to apply the rule contended for that husband and wife are to such an extent one as to make her relations by affinity his. If there is any such rule, the wife's existence is merged in that of the husband, which would defeat the contention that the husband stands in the place of the wife: *O'Neal* v. *State*, 47 Ga. 229, (1872).

The case of *Chinn* v. *State*, 47 Ohio St. 575, (1890), is in direct conflict with Chancellor Walworth's dictum, above referred to. There it was held that a man and his wife's brother's wife were not related by affinity. Likewise Christian, in his note to I Blackstone, 435, declared that even where by the law it is unlawful to marry one related by affinity, a man may marry his wife's brother's wife, the circumstances permitting.

Possibly the most recent case holding the view opposite to *State* v. *Wall* is *Tegarden* v. *Phillips*, 42 N. E. (Ind.) 549, (1895), which is exactly parallel to the present case. In this case the judge admits that a line of affinity extends from the husband to the wife's blood and *vice versa*; but he denies that new blood can be introduced by the marriage of the affinity relatives of either.

The great question seems to be, are husband and wife one person, or are they for the present purposes united by the strongest kind of an affinity, which would, however, prevent any relationship between the husband and the wife's affinity relatives.

However, which is the better rule on grounds of public policy? The doctrine, of course, was established to prevent interested parties from acting as judges; and, to this end, some fixed rule had to be adopted. Unsatisfactory it was of necessity. Frequently the greatest temptation to partiality occurs in the trial of an intimate friend who falls within no prohibitory clause, on the ground of relationship. The family spirit of to-day is hardly the same powerful influence that it was a century ago, and while not to be disregarded, should warrant a restrictive and not a broad construction of such a statute as the present. It may be that there is as much inclination to favor your wife's niece's husband as to favor your wife's nephew, but there must be a line of demarcation somewhere.

PROMISSORY NOTES—CONTRACT OF INDORSER—PAROL EVIDENCE TO VARY. *Northern National Bank* v. *Hoopes*, 98 Fed. 935, (1900). This case was decided in the Circuit Court, having come up in the Eastern District of Pennsylvania. The decision was rendered by Judge Dallas. It is of importance because of throwing light on the vexed question—in Pennsylvania, at least—of the admission of parol evidence to vary the contract of an indorser on a promissory note.

The defendant in the case under consideration alleged that an express oral agreement, made at the time the note was indorsed, was to the effect that if the maker was not satisfied with the work to be done by the promisee in consideration of the note, the note was to remain unpaid. To quote from the opinion: "The oral agreement alleged is in direct contradiction of the absolute obligation incurred by the defendant's indorsement of the note sued on, and it cannot be received to annex a condition to that obligation."

The question of the place of contract was not germane, for the case dealt not with local, but general commercial law. *Swift* v. *Tyson*, 16 Pet. 1, (1842), and subsequent cases are cited to confirm this point.

"In Pennsylvania, it is true, it has been decided that the contract evidenced by the blank indorsement of a promissory note is not subject to the rule which excludes oral evidence to alter or vary the terms of a written agreement: *Ross* v. *Espy*, 66 Pa. 482, (1870). But the distinction upon which this decision was based seems to me to be unwarranted. The contract of indorsement is not an 'implied' one. An implied contract, in the legal sense of the term, is one which has no existence in fact, but which the law for the furtherance of justice imposes upon a party, who, under the circumstances of the case, ought to be held as if he had contracted, though in truth he never contracted at all. It is founded upon legal obligation, but is actually non-existent, whereas the contract of indorsement is a veritable one, in which the element of consent is always present. 'It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants, and for the convenience of commerce, are usually omitted, but not the less on

that account perfectly understood. All its terms are certain, fixed and definite, and when necessary, supplied by that common knowledge, based on universal custom which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation, so that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full:' " *Martin* v. *Cole*, 104 U. S. 37, (1881).

The cases on this point are numerous and the question well nigh settled. See *Chaddock* v. *Vanness*, 35 N. J. Law, 517, (1871); *Bank* v. *Dunn*, 6 Pet. (U. S.) 51, (1832); *Bast* v. *Bank*, 101 U. S. 93, (1879).

Indeed, even in Pennsylvania, *Phillips* v. *Meily*, 106 Pa. 536, (1884), seems to throw much doubt upon, if not to directly overrule, *Ross* v. *Espy*. It is to be hoped that decisions like the one under consideration will do much to settle the doubt in Pennsylvania, where to-day the question is still in dispute.